

Before the **DOCKET FILE COPY ORIGINAL**
FEDERAL COMMUNICATIONS COMMISSION **RECEIVED**
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JUN 17 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Applications of WorldCom, Inc. and)
MCI Communications Corporation for)
Transfer of Control of MCI Communications)
Corporation to WorldCom, Inc.)

CC Docket No. 97-211

To: The Commission

**JOINT OBJECTION
OF WORLDCOM, INC. AND MCI COMMUNICATIONS CORPORATION
TO DISCLOSURE OF STAMPED CONFIDENTIAL DOCUMENTS**

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Dated: June 17, 1998

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WorldCom, Inc. ("WorldCom") and MCI Communications Corporation ("MCI") (collectively "Applicants"), by their undersigned counsel, pursuant to the Order Adopting Protective Order released by the Commission in this proceeding on June 5, 1998 (the "Protective Order"), hereby object to the disclosure of Stamped Confidential Documents to certain persons who have executed an Acknowledgment of Confidentiality on behalf of GTE Service Corporation, its affiliated telecommunications companies, and GTE Internetworking (collectively "GTE").¹

Specifically, Applicants must object to disclosure of Stamped Confidential Documents to attorneys at the Howrey & Simon law firm, namely Scott Flick, James Olson, and Mark Schechter, and attorneys at the Kirkland & Ellis law firm, namely Steven G. Bradbury, and John Frantz, who

¹ GTE has submitted Acknowledgments of Confidentiality on behalf of twelve individuals. Applicants do not object to five of those individuals who are either employed by GTE's counsel of record in this proceeding (Wiley Rein & Fielding partners R. Michael Senkowski, Robert J. Butler; associate R. Paul Margie; and legal assistant Lynne Montgomery), or who is an in-house antitrust counsel at GTE (David E. Wheeler) and does not hold an officer position.

are not "counsel of record" to GTE in this proceeding. Applicants also object to disclosure of Stamped Confidential Documents to Richard W. Stimson and C. Daniel Ward on the grounds that these senior level in-house counsel are actively engaged in "competitive decision-making" for GTE and are therefore not eligible to review the highly proprietary and competitively sensitive documents produced pursuant to the Protective Order. Applicants received the Acknowledgments of Confidentiality of Mr. Flick, Mr. Olson, Mr. Schechter, Mr. Bradbury, Mr. Frantz, and Mr. Ward on June 12, 1998, and the Acknowledgment of Confidentiality of Mr. Stimson on June 16, 1998. This objection is therefore timely pursuant to Paragraph 5 of the Protective Order.

I. THE PROTECTIVE ORDER SPECIFICALLY LIMITS DISCLOSURE OF STAMPED CONFIDENTIAL DOCUMENTS TO "OUTSIDE COUNSEL OF RECORD."

The Protective Order specifically limits the disclosure of Stamped Confidential Documents to "*outside counsel of record and in-house counsel who are actively engaged in the conduct of this proceeding.*" Protective Order ¶ 3 (emphasis added). Pursuant to Rule 1.52 of the Commission's Rules, 47 C.F.R. § 1.52, counsel of record are the attorneys representing a party before the FCC that sign "petitions, motions, pleadings, briefs, and other documents filed by any party represented by counsel." Counsel of record do not include attorneys who are not identified as counsel on such documents. *See, e.g.,* U.S. Supreme Court Rule 9 ("The attorney whose name, address, and telephone number appear on the cover of a document presented for filing is considered counsel of record[.]"); *Leventhal v. New Valley Corp.*, 148 F.R.D. 109, 112 (S.D.N.Y. 1993) (holding that "attorneys of record" for purposes of sanctions under Rule 11 of the Federal Rules of Civil Procedure are attorneys who signed various pleadings, motions, and other papers submitted on behalf of represented party, and not other counsel of represented party.)

In this regard, it is telling that, in its comments to the Commission as to the appropriate terms of the protective order to be issued in this proceeding, GTE specifically argued that *all* outside counsel, and not only outside *counsel of record*, should be permitted access to Stamped Confidential Documents:

[T]he Applicants would prevent review by outside counsel who are not of record, but who nevertheless play an integral role in preparing the petitioners' analyses. GTE therefore suggests that access to protected documents be offered 'to outside counsel of record, in-house counsel who are actively engaged in the conduct of this proceeding, or counsel otherwise assisting the parties in this proceeding who are actively engaged in the conduct of this proceeding.'²

Significantly, the Commission specifically noted GTE's proposed expansion of the terms of the protective order proposed by the Applicants, *Order Adopting Protective Order* at n.9, but did not modify the proposed protective order to permit the expanded disclosure advocated by GTE. *Id.* at ¶ 5. Notwithstanding the Protective Order's clear restriction of disclosure to outside "*counsel of record*," GTE once again seeks -- this time unilaterally -- to expand disclosure to a category of counsel which is not permitted by the Protective Order as adopted by the Commission.

Counsel of record for GTE in this proceeding are those outside counsel who have already prepared and signed pleadings filed on behalf of GTE, or who are identified on the signature blocks of pleadings filed on behalf of GTE.³ To date, the outside counsel of record for GTE is the law firm

² Comments of GTE On the Proposed Protective Order Filed by WorldCom and MCI, filed May 7, 1998, at 2-3 (emphasis added).

³ GTE should not be permitted to circumvent the limitation of disclosure of Stamped Confidential Documents to "outside counsel of record" by filing additional pleadings now identifying additional outside counsel of record. To do so would make a mockery of the Commission's Protective Order.

of Wiley, Rein & Fielding. No other outside law firm or counsel have signed or are identified on the signature block of pleadings filed on behalf of GTE. Therefore, because the attorneys identified above from the firms of Kirkland & Ellis and Howrey & Simon are not "outside counsel of record" in this proceeding as required by the Protective Order, they must be denied access to Stamped Confidential Documents pursuant to the Protective Order.

Moreover, given that a number of Wiley, Rein & Fielding attorneys, including some of the most senior partners in the firm, have represented GTE throughout this proceeding and are therefore intimately familiar with GTE's position and interests, there is no reason to believe that they now need the assistance of five additional outside counsel from two additional law firms to review the documents produced by Applicants. For this reason, the review of Stamped Confidential Documents by GTE's outside counsel should be performed solely by GTE's counsel of record in this proceeding: Wiley, Rein & Fielding.

II. THE PROTECTIVE ORDER PRECLUDES ACCESS TO STAMPED CONFIDENTIAL DOCUMENTS BY IN-HOUSE COUNSEL INVOLVED IN COMPETITIVE DECISION-MAKING.

In the Protective Order, the Commission strictly limited disclosure of Stamped Confidential Documents to "outside counsel of record and in-house counsel who are actively engaged in the conduct of this proceeding, *provided that those in-house counsel seeking access are not involved in competitive decision-making, i.e., counsel's activities, association, and relationship with a client that are such as to involve counsel's advice and participation in any or all of the client's business decisions made in light of similar or corresponding information about a competitor.*" Protective Order ¶ 3 (emphasis added). This standard was derived from the standard adopted by federal courts. *Id.*, citing *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 n.3 (Fed. Cir. 1984); *Brown Bag*

Software v. Symantec Corp., 960 F.2d 1465, 1470 (9th Cir. 1992), *cert. denied*, 506 U.S. 869 (1992).

The test for whether in-house counsel access is proper depends upon whether such access will present "*an unacceptable opportunity for inadvertent disclosure*" of confidential discovery materials. *U.S. Steel*, 730 F.2d at 49 (emphasis added), *see also* Louis S. Sorrell, "In-House Counsel Access to Confidential Information Produced During Discovery in Intellectual Property Litigation," 27 J. Marshall L. Rev. 657, 679.

The risk of inadvertent disclosure depends upon the extent to which in-house counsel participate in competitive decision-making of their employer. *Id.* Richard W. Stimson is Vice President and Deputy General Counsel of GTE. Disclosure of highly confidential competitive information to in-house counsel who are also corporate officers and senior law department management would create an unavoidable situation whereby such attorneys are so inextricably involved in the competitive decision-making of the company that inadvertent disclosure of the confidential information is almost a certainty. Because corporate officers and senior law department managers are actively involved in a wide array of strategic corporate matters, they necessarily participate in competitive decision-making. Mr. Stimson fits this description of in-house counsel who is a senior law department manager and a Vice President of GTE. Similarly, Mr. Ward is Assistant General Counsel - Antitrust and Litigation, and in that position is a senior law department manager who works very closely with William P. Barr, Executive Vice President & General Counsel of GTE Service Corporation. Mr. Ward is therefore also closely intertwined with and actively engaged in the competitive decision-making of GTE. Because the inadvertent disclosure of confidential information is a virtual certainty for both Mr. Stimson and Mr. Ward in the course of conducting their senior level responsibilities, and therefore clearly presents an "unacceptable

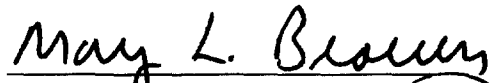
opportunity" for such disclosure, neither Mr. Stimson nor Mr. Ward should be permitted to have access to Stamped Confidential Documents.

CONCLUSION

For the reasons stated above, Applicants ask that Richard W. Stimson and C. Daniel Ward of GTE; Scott Flick, James Olson, and Mark Schechter of Howrey & Simon; and Steven G. Bradbury, and John Frantz of Kirkland & Ellis be denied access to Stamped Confidential Documents pursuant to the Protective Order.

Respectfully submitted,

**MCI COMMUNICATIONS
CORPORATION**


Mary L. Brown

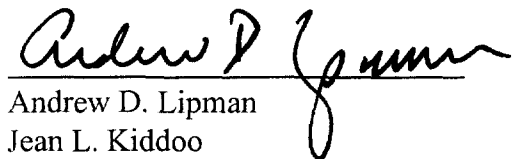
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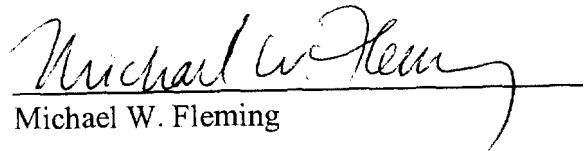
CERTIFICATE OF SERVICE

I, Michael W. Fleming, hereby certify that on June 17, 1998 a copy of the foregoing
“JOINT OBJECTION OF WORLDCOM, INC. AND MCI COMMUNICATIONS
CORPORATION TO DISCLOSURE OF STAMPED CONFIDENTIAL DOCUMENTS” was
hand delivered, to the following:

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